IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 176 OF 1997

Yuvraj Hanmantrao Barge ..Applicant

Vs.

The State of Maharashtra ..Respondent

Mr. S.V. Kotwal, Mr. A.R. Kapadni with Mr.M.S. Mohite for applicant.

Mr. Y.S. Shinde, APP for State.

CORAM: B.H. MARLAPALLE, J.

Date : January 16 & 17, 2007.

ORAL ORDER:

1. The applicant was tried as accused no.1 by the learned Assistant Sessions Judge at Solapur in Sessions Case No.191 of 1991 for the offences punishable under Sections 323, 342, 354, 363, 366 and 506 read with Section 34 of Indian Penal Code as well as Section 57 of the Bombay Children Act 1948. By his Judgment and Order dated 3/6/1993 the learned IInd Assistant Sessions Judge was pleased to acquit the accused no.2 from all the offences and accused no.1 from the offences punishable under Sections 323, 342 and 506 of IPC. Whereas accused no.1 came to be

convicted and sentenced for the offences punishable under Sections 363, 366 and 354 of IPC. The said order of conviction and sentence came to be challenged in Criminal Appeal No.52 of 1993 and the learned 3rd Additional Sessions Judge at Satara was pleased to dismiss the said appeal by his Judgment and Order dated 4/8/1997. Hence, this criminal revision application under Section 397 of Cr.P.C. by the convicted accused no.1.

2. The incident was alleged to have taken place in the midnight of 31/1/1991. As per the prosecution, Archana @ Gangutai, one of the four daughters of the complainant P.W.2 Sarubai, was kidnapped by the accused while she was sleeping in the open courtyard of the hall along with other family members and Jaya, the youngest daughter, started crying and, therefore, Sarubai got up and Jaya, while crying, was stating that Archana was missing. Babu (PW 3), her only son, came back from the movie and along with Usha (PW 6), the second daughter and son, Sarubai went to the police station and filed a complaint that her daughter Archana was kidnapped. The police along with Babu (PW 3) searched Archana and found her in the company of

accused no.1 in the house of Ramchandra Barge within a short span of about half an hour. Archana and accused no.1 were both brought to the police station in the midnight itself and she lodged a complaint at Exh.17 to the effect that she was kidnapped by both the accused. Police registered the offence vide Crime No.17 of 1991 and arrested the accused. Both the accused as well as Archana were sent for medical examination, statements of the family members and other witnesses were recorded and on completion of investigation, charge-sheet was submitted to the learned JMFC. On committal, the case was tried by the learned Assistant Sessions Judge before whom in all 13 witnesses were examined by the prosecution.

3. The acquittal of accused no.2 from all the offences as well as acquittal of accused no.1 from the offences punishable under Sections 323, 342 and 506 of IPC was not challenged. The learned Additional Sessions Judge reconsidered the evidence and agreed with the view taken by the trial court. As per the Lower Appellate Court the prosecution proved that the accused no.1 had kidnapped Archana from her lawful guardianship in the midnight of 31/1/1991, the

prosecution further proved that the accused no.1 abducted Archana with intend that she may be forced to illicit intercourse and prosecution has also proved that Archana was subjected to criminal force with intend to outrage her modesty and thereby committed the offence punishable under Section 354 of IPC and under Section 57 of the Bombay Children Act.

4. The learned counsel for the accused-applicant submitted that even if the evidence is read as it is of all the concerned witnesses, including the prosecutrix, there was no case made out for an offence punishable under Section 366 of IPC. So far as the offences under Sections 363 and 354 of IPC are concerned, it is submitted that the prosecutrix was known to the accused, she had left her house in the midnight on 31/1/1991 on her own free will and there was no element of force or coercion, leave alone, that she was abducted or kidnapped from her house. As per the learned counsel the evidence of the prosecutrix herself would go to show that she was in the company of the accused by her own free will and at no point of time she raised any alarm though she had ample opportunities to do so. It is by way of an after

thought that she filed the complaint Exh.17 with the police station and may be at the instance of the complainant-mother as well as other members of the family. It was also submitted that the evidence adduced by the prosecution regarding the prosecutrix being minor or at the age of about 15 years (less than 16 years of age) does not inspire confidence so as to reach to the conclusion, beyond reasonable doubt, that the prosecutrix was born on 16/6/1976. For all these reasons it has been submitted that the conviction as well as the sentence order passed against the applicant deserves to be quashed and set aside by acquitting him of all the three offences for which he has been held to be guilty. The learned APP, on the other hand, has supported the order of conviction and sentence as passed by the learned Assistant Sessions Judge and confirmed by the Lower Appellate Court.

5. Out of the 13 witnesses examined by the prosecution, P.W.1 Gulab More, P.W.9 Aslam Shaikh, P.W.10 Kalidas Kamble, P.W.11 Keshav Kejkar are all police personnel and so is P.W.13 Dagadu Jadhav, who acted as the I.O. initially and then handed over the investigation to P.W.11. Dr.Sudhakar Wagholikar (PW

12) was examined as the Medical Officer, who had examined the accused as well as the prosecutrix. The injury certificate at Exh.39 regarding the injuries on the person of the prosecutrix issued by P.W.12 and another medical certificate at Exh.40 issued by Dr.Astekar regarding the medical examination of the prosecutrix which was conducted at 6 a.m. on 1/2/1991 were proved by the prosecution through the testimony of P.W. 12. The medical certificate at Exh.40 certified that the prosecutrix was not subjected to sexual intercourse though there were some injuries noticed on both of her thighs. the certificate at Exh.39 also indicating the injuries noticed on the thighs of the prosecutrix.

6. In addition to the medical evidence, the prosecution case mainly rests on the evidence of P.W.2 Sarubai - the complainant, P.W.4 the prosecutrix, P.W.6 Usha, P.W.7 Ramchandra Kanase and P.W.8 Vijay Mane. P.W.9 Aslam Shaikh was the police constable on duty in the night of 31/1/1991 at the Koregaon Police Station and was on patrolling duty along with two other constables by name Utekar and More and P.W.10 Kamble, then Head Constable, was Police Station

Officer in the night, while Keshav Kejkar P.W.11 was the PSI. He stated before the trial court that at about 12 in the midnight on the date of the incident when the patrolling party intended to start their duty from the police station, Sarubai along with her son Babu (PW 3) and one girl came to the police station and reported that the prosecutrix was kidnapped by the accused. Search was started along with P.W.2 and P.W.3 and they went towards the Modern School. They heard noise from the house of Ramchandra Barge which is near the Modern School and, therefore, they entered the same house and called accused no.1 from outside. Within a short time, the door of the room was opened by accused no.1 Yuvraj and the prosecutrix was also found to be in the said room at that time wearing a petticoat and blouse on her person and was standing in a frightened condition. This was seen by him with the help of a torch and the time was approximately 1 a.m. When he asked the prosecutrix as to how she reached there, she informed him that accused no.1 had brought her in that room and he made advances to sleep with her. Both of them were taken to the police station, where P.W.10 Kamble was present and in the police station Archana narrated the incident to PSI Jadhav

(PW 13). Her statement was reduced in writing by P.W.13. Thereafter accused no.2 was searched and he was found at Koregaon only. He was apprehended and brought to the police station. In his cross-examination, the details of the incident as disclosed by this witness, could not be shaken and in any case when the trial court recorded the statement under Section 313 of Cr.P.C. the accused-applicant admitted that he was brought to the police station along with the prosecutrix by the police party in the midnight of 31/1/1991. He also admitted that he along with accused no.2, was subjected to medical examination on 1/2/1991 while in the police custody.

7. It is, therefore, necessary to examine the evidence whether prosecutrix accompanied the accused no.1 and was in his company on her own free will or whether she was forcibly taken away by the accused no.1 from her house in the midnight of 31/1/1991. We will have to, therefore, consider the evidence of prosecutrix (PW 4), her brother Babu (PW 3), her mother Sarubai (PW 2) and sister Usha (PW 6). While in the witness box, the prosecutrix stated that she had other three daughters, two elder and one younger

and one elder brother Babu, she had studied upto 8th standard at Modern High School at Koregaon, on 31/1/1991 she had returned from the school at about 5 p.m., she had her dinner at about 8.30 p.m. along with her mother and sisters and thereafter they went to sleep in the courtyard. Her brother Babu had gone to see a movie and at about 11 to 11.30 in the night, accused nos.1 and 2 came to her house. She got up from her sleep when the accused pulled the quilt from her person. Accused No.1 asked her to get up and when she asked for what, he said you get up and asked her to keep mum and follow him. He also threatened her that he would kill her if she did not come. She, therefore, got up and followed both the accused. At that time accused no.2 Chandrakant Barge was standing near the head of Usha by putting his foot on the quilt on the person of Usha. Both the accused dragged her to the building of Modern High School and took her in one of the class rooms. They went out and closed the door from outside. She heard the noise of quarrel between both the accused and thereafter accused no.1 opened the door of that room and came inside. Accused no.2 was not found there and thereafter accused no.1 took her to the house of Ramchandra Barge which is

near the school. All along he was holding her hand and accused no.1 threatened her to beat by the stick which he was holding. When she was taken to the house of Ramchandra Barge, none was there and the house consisted of only one room covered with thatched roof. In that room, the accused no.1 asked her to remove her saree and when she declined to do so, he removed her saree and other clothes from her person. He started making advances to molest her but within a short time 2-3 policemen came there and they called him outside. Thereafter, accused no.1 opened the door from inside and the police picked up both of them and took them to the police station. Her brother PW 3 Babu was accompanying her to the police station and after reaching the police station, she found her mother as well as sister Usha in the police station. She also stated that her statement was recorded in the police station and she was sent for medical examination to the Civil Hospital at Satara where she was examined by a lady Medical Officer.

. In her cross-examination, she stated that though there was no electricity supply to her house, the electric pole which was about 20 ft. away from

her house provided sufficient light to see and identify the accused. She did not raise any hue and cry when accused no.1 pulled the quilt from her person. She did not ask her mother or sister to get up after accused no.1 pulled her quilt. Initially she was taken by accused no.1 behind the building of the school and accused no.1 had caught her hands. She did not raise any hue and cry. Thereafter the accused took her to the room in the school. She was not willing to go with him but for the threats he gave. She denied the suggestions that she herself went to the accused from her house and the accused were standing outside her house. The cross-examination of this witness did not in any way impeach her case that she was forcibly taken away and under the threats of intimidation by accused no.1, initially behind the school, then in one of the rooms in the school and thereafter in the room of Ramchandra Barge.

8. This evidence of the prosecutrix has been corroborated by the evidence of PW 2, PW 3 and PW 6. Both the courts below, based on the depositions and other documentary evidence adduced by the prosecution have concurrently held that the offence punishable

under Section 363 of IPC has been proved. The concurrent findings on the offence of kidnapping, as recorded by the courts below, cannot be, therefore, termed as perverse or erroneous.

9. The only issue, therefore, remains is regarding the age of the prosecutrix and in this regard the prosecution has examined PW 7 Ramchandra Kanase and PW 8 Vijay Mane. Both the courts below have accepted the evidence coming through these two witnesses to hold that the prosecutrix was born on 16/6/1976. PW 7 Ramchandra Kanase was the Village Development Officer at village panchayat Koregaon since 17/12/1990 and the register for births and deaths maintained by the said village panchayat in the normal course of business was brought by him before the court. Entry No.217 on page 27 of the said register shows that a female child was born to Maruti Tatyaba Misale and Sarubai Maruti Misale on 16/6/1976 and there was a further entry made in hand writing on 1/7/1981 regarding the female child's name as "Tilganga". He confirmed that the certificate dated 27/3/1991 (Exh.23) was issued by him based on entry no.217 in the said register. In the evidence of PW 8

Vijay Mane, the Assistant Head Master of Modern High School, general register maintained by the said school was placed before the trial court and the entry at Sr.No.5971 on page 290 of the said register pertained to the entry of admission of a female student by name Gangutai d/o Maruti Misale and her date of birth in column no.5 of the register was shown as 16/6/1976, whereas her date of entry in the 7th standard was shown as 9/7/1988. The register also indicated that the said student Gangutai left the school on 31/1/1992 while she was in the 9th standard. From the evidence of PW 7 and PW 8, two arguments have been advanced to discard the said evidence. Firstly, it is stated that the name in the village panchayat register was Tilganga, whereas the same name of the prosecutrix has not come anywhere on record in the depositions of either her mother or herself. Secondly, it is submitted that in the school register her name was shown as Gangutai, whereas the prosecutrix gave her name to the police as Archana and in addition, the register of the school where she studied upto 6th standard was not brought before the court and, therefore, the register placed before the court by PW 8 could not have been accepted in isolation. In the

evidence of PW 2 Sarubai as well as PW 4, and the prosecutrix, the prosecution has brought out that her name is Gangutai alias Archana. In addition, the document at Exh.27 in column 6 has given the name of the earlier school i.e. Zilla Parishad School, Koregaon No.1 and the PW 8 in his cross-examination stated that the school leaving certificate issued by the same school regarding admission of Gangutai was in his office. He was given a specific suggestion that the entry regarding the date of birth made in column no.5 at Exh.27 was not as per the school leaving certificate issued by the Zilla Parishad School and the same was denied by him in his cross-examination. He also denied that any of the entries in the said certificate at Exh.27 were wrong. We must also note that in the cross-examination, PW 7 stated that the entry no.217 on page 27 of the birth register indicated that 4th child born to Sarubai w/o Maruti and in the evidence of PW 2 Sarubai, PW 6 Usha and PW 4 prosecutrix, it has been clearly brought out that the prosecutrix is the 4th child of Sarubai and Maruti, the first being Shobha, the second Usha, third Babu, fourth prosecutrix and fifth Jaya. The courts below were, therefore, justified in accepting that the

prosecutrix was born on 16/6/1976.

10. This court under its revisionary powers under Section 401 of Cr.P.C. does not have the powers of an appellate court to reappreciate the evidence. However, the above discussion shows that the evaluation of the evidence made by the Lower Appellate Court cannot be impeached on any ground and the findings, confirming the trial court's order of conviction and sentence, are based on sound reasons so far as offences punishable under Sections 354 and 363 of IPC are concerned. There could be no dispute that the evidence adduced by the prosecution and accepted by both the courts below does not make out a case for an offence punishable under Section 366 of IPC as noted hereinabove and to that extent the impugned order of conviction and sentence passed by the trial court and confirmed by the Lower Appellate Court is unsustainable. The applicant deserves to be acquitted for an offence punishable under Section 366 of IPC.

11. The learned counsel for the applicant relied upon a decision of this court in the case of Abdul Wahed s/o Mohd. Abdullasaheb vs. Abdul Salemm s/o

Abdul Razak Bhojani and anr. **[1986 (1) Bom.C.R.511]** in support of his contentions that the prosecutrix had attained the age of discretion and though she was below the age of 18 years, she had gone out with the accused and out of the custody of her lawful guardian of her own accord and out of her own desire and, therefore, there was no case made out for an offence punishable under Section 363 of IPC. This court, in para 7, in Abdul Wahed Mohd. Abdullasaheb's case (Supra), inter alia, observed as under:-

> ".....If the girl is of the age of discretion and if she goes out of the custody of her lawful guardian of her own accord and out of her own desire and starts living with some other person, it cannot be said that it is the other person who has "taken" her away or enticed her away from out of the lawful custody of her original guardian; for in such cases if may be that the person accused of kidnapping her might have given to her co-operation for effecting a successful escape from the custody of her guardian. But ultimately it will be a question of extent of

role played by the accused. If the accused has played major role and if the girl as such has played a completely passive role and has merely acquiesced in the act of being taken away by the accused, it will most probably mean that the positive role is that of accused and hence he has committed an offence under Section 363....."

. In the instant case, as noted earlier, the defence had suggested to the prosecutrix that she had on her own, joined the company of the applicant-accused while he was waiting on the road outside the courtyard in the night of 31/1/1991 and this suggestion was stoutly denied. The prosecutrix described in detail as to how, under the threats of intimidation and force of violence, she was taken away by the accused by holding her both hands and with a stick in his other hand. In the cross-examination of the prosecutrix nothing was brought out to disbelieve or discard this testimony.

12. In the premises, this criminal revision application deserves to be dismissed in regard to the

conviction and sentence under Sections 354 and 363 of IPC.

13. At this stage Mr. Mohite the learned counsel appearing for the applicant submitted that as per the instructions received by him, the applicant is now a practicing advocate in Satara District and, therefore, he desires to submit an application under Section 360(4) of Cr.P.C. praying for the benefit of being released on probation rather than sentencing.

14. Time granted. S.O. for one week.

(B.H. Marlapalle,J.)